

1988

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Recommended Citation

Julio A. Thompson, *A Board Does Not a Bench Make: Denying Quasi-Judicial Immunity to Parole Board Members in Section 1983 Damages Actions*, 87 MICH. L. REV. 241 (1988).

Available at: <https://repository.law.umich.edu/mlr/vol87/iss1/7>

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NOTES

A Board Does Not a Bench Make: Denying Quasi-Judicial Immunity to Parole Board Members in Section 1983 Damages Actions

"We're not judges. We don't have the same independence."

— Anonymous Member, California Board of Prison Terms¹

INTRODUCTION

H.I. McDunna stood before the three-member panel of the Arizona State Board of Pardons and Paroles. In this hearing, the Board would determine whether to release H.I. ("Hi"), a three-time armed robber, once again.

First Member: They got a name for people like you, Hi: Re-ci-di-vism.

Second Member: Re-peat o-f-fender.

First Member: Not a pretty name, is it, Hi?

Hi: No sir. That's one bonehead name, but that ain't me anymore.

Second Member: You're not just telling us what we want to hear?

Hi: No sir. No way.

First Member: 'Cause we just want to hear the truth.

Hi: Then I guess I am telling you what you want to hear.

Second Member: Boy, didn't we just tell you not to do that?

Hi: Yes sir.

Second Member: (approving parole) Okay, then.²

Although this scene is from a motion picture comedy, its depiction of a parole release hearing is not far from the mark. Conducting as many as 135 hearings a day,³ parole board members have few opportunities to be thorough. More ominously, because of their low profile in the criminal justice system, parole board members have few checks on their authority. The results can be far from comedic. On numerous occasions, parole board members, through deliberate or reckless action, have violated the constitutional rights of prisoners and members of society.

The violations of prisoners' constitutional rights have occurred primarily in two settings. The first is the parole *revocation* hearing, where a parolee, arrested and reimprisoned for an alleged parole violation, is allowed to hear and contest the charges against him. In *Morrissey v.*

1. Girdner, *Politics Plays Role in Parole Board's Rulings on "Lifers,"* L.A. Daily J., Apr. 19, 1983, at 1, col. 6.

2. *Raising Arizona* (Twentieth-Century Fox 1986).

3. See Dawson, *The Decision to Grant or Deny Parole*, in *THE INVISIBLE JUSTICE SYSTEM: DISCRETION AND THE LAW* 148, 171 (2d ed. 1982).

Brewer,⁴ the Supreme Court held that a parolee has a right to procedural due process at these hearings. Yet, for over a decade, allegations of violations of prisoners' *Morrissey* rights by parole board members have continued. Alleged procedural due process violations have included conspiracy to fabricate charges against the parolee,⁵ exclusion of a prisoner's attorney, denial of his right to confront hostile witnesses, denial of the right to a speedy hearing,⁶ and even complete denial of a revocation hearing.⁷ The second setting for the violation of prisoners' rights is the parole *release* hearing. In release hearings, the Supreme Court has declared that prisoners' rights are not guaranteed by *Morrissey*, but depend upon the expectations created by state statutes.⁸ Finally, it is possible that parole board members may violate the constitutional rights of citizens by recklessly paroling highly dangerous prisoners. Such paroles may lead to the serious injury or death of innocent members of the public.⁹

In theory at least, all victims suffering constitutional violations at the hands of state officials have a remedy under 42 U.S.C. section 1983.¹⁰ The language of section 1983 seems to permit no exception from its sweep. Likewise, the legislative history of section 1983¹¹ contains no evidence that Congress intended any exception whatsoever.¹²

4. 408 U.S. 471, 488-89 (1972).

5. See *Harper v. Jeffries*, 808 F.2d 281 (3d Cir. 1986).

6. See *Trotter v. Kline*, 748 F.2d 1177 (7th Cir. 1984).

7. See *Pope v. Chew*, 521 F.2d 400 (4th Cir. 1975).

8. See *Greenholtz v. Inmates of the Neb. Penal & Correctional Complex*, 442 U.S. 1, 9-12 (1979); cf. *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (statutory provision for good-time credits creates an interest protected by due process clause; once a statute or state practice creates such an interest, due process protections are necessary "to insure that the state-created right is not arbitrarily abrogated").

9. While numerous cases exist describing serious injury to private citizens caused by parolees, courts have been reluctant to find a deprivation of constitutional rights. See, e.g., *Nelson v. Balazic*, 802 F.2d 1077 (8th Cir. 1986) (victims kidnapped and sodomized by recent parolee, but deprivation of constitutional rights not found by the court); *Fox v. Custis*, 712 F.2d 84 (4th Cir. 1983) (three women raped, shot, beaten and set on fire by parolee); *Reiff v. Commonwealth of Pennsylvania*, 397 F. Supp. 345 (E.D. Pa. 1975) (victim shot and permanently injured by recent parolee; suit allowed on negligence grounds, but constitutional deprivation only tacitly acknowledged). Cf. *Grimm v. Arizona Bd. of Pardons and Paroles*, 115 Ariz. 260, 564 P.2d 1227 (1977) (en banc) (state tort action brought by victims shot and killed by released psychotic inmate).

For a cursory glance at the causation issues posed by characterizing such actions as constitutional violations at the hands of parole board members, see notes 144-45 *infra* and accompanying text. However, a thorough discussion is beyond the scope of this Note.

10. 42 U.S.C. § 1983 provides that

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

11. Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13 (1873) (first enacted as § 1 of the Civil Rights Act of 1871).

12. The Act's avowed purpose, to enforce the fourteenth amendment, was a response to a

To state a claim for relief, a plaintiff need demonstrate only that she was deprived of a constitutional right by a state official acting under "color" of state law.¹³ However, since 1951, the Supreme Court has carved out numerous exceptions to the coverage of section 1983 by giving certain governmental actors official immunity from suit. Today judges,¹⁴ police officers,¹⁵ prosecutors,¹⁶ governors,¹⁷ cabinet members,¹⁸ and presidents of the United States¹⁹ have been accorded either absolute or qualified immunity.

Absolute, or quasi-judicial, immunity means exactly that. When the doctrine applies, it is not possible to maintain a personal damage suit against the government official for injuries sustained as a result of her official conduct, no matter how extensive or egregious the constitutional injury. If absolute immunity applies, the plaintiff may seek only injunctive relief under section 1983²⁰ or criminal prosecution under 18 U.S.C. section 242.²¹

Qualified immunity, on the other hand, exposes officials to damages liability only if they violate a "clearly established" constitutional right. This objective standard, established in *Harlow v. Fitzgerald*,²² is a radical departure from the rule in previous decisions requiring the plaintiff to show that the defendant acted with malicious intent.²³ The

period of lawlessness in the southern states marked by the toleration of acts of violence by state and local governments against certain classes of the citizenry. See Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323, 1334 (1952). For a thorough history of § 1983, see *Monroe v. Pape*, 365 U.S. 167, 174-75 (1961), *overruled by Monell v. Department of Social Serv.*, 436 U.S. 658 (1978); Note, *Dormant Commerce Clause Claims Under 42 U.S.C. § 1983: Protecting the Right To Be Free of Protectionist State Action*, 86 MICH. L. REV. 157, 175-78 (1987); Kinoy, *The Constitutional Right of Negro Freedom*, 21 RUTGERS L. REV. 387 (1967).

13. See *Gomez v. Toledo*, 446 U.S. 635, 640 (1980). The latter element, acting "under color of state or territorial law," known as the "state action" requirement, may be met even if the act of the official violates state law, so long as the official is vested with the authority of the state. *Monroe*, 365 U.S. at 183-87.

14. *Pierson v. Ray*, 386 U.S. 547, 553-54 (1967) (absolute immunity for state judges).

15. *Pierson v. Ray*, 386 U.S. at 557 (qualified immunity for police officers).

16. *Imbler v. Pachtman*, 424 U.S. 409 (1976) (absolute immunity for prosecutors).

17. *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (qualified immunity for governor and aides).

18. *Butz v. Economou*, 438 U.S. 478 (1978) (absolute immunity for Secretary of Agriculture and various departmental hearing examiners).

19. *Nixon v. Fitzgerald*, 457 U.S. 731 (1982) (absolute immunity for President).

20. In recent years, the Supreme Court has expressed its reluctance to grant injunctive relief. See *Rizzo v. Goode*, 423 U.S. 362, 378 (1976) (stating that injunctive relief under § 1983 should be granted sparingly).

21. 18 U.S.C. § 242 (1982). Section 242 charges usually arise in cases where state officials employ unlawful force. See *Williams v. United States*, 341 U.S. 97 (1951) (upholding § 242 conviction of police officer extracting confessions by means of beatings with rubber hose, pistol, club, and other items). Official immunity doctrine does not apply to § 242. See *Gravel v. United States*, 408 U.S. 606, 627 (1972) (official immunity does not reach "so far as to immunize criminal conduct proscribed by an Act of Congress").

22. 457 U.S. 800, 818 (1982).

23. See, e.g., *Scheuer v. Rhodes*, 416 U.S. 232 (1974) (Ohio governor sued under § 1983 for decision to deploy National Guardsmen at Kent State during May 1970 demonstrations against

Harlow Court abandoned this rule because it was convinced that, given the difficulty of defining the relevant evidence, an inquiry into the defendant's subjective state of mind would require intensive discovery — including numerous depositions of the defendant and colleagues — and full-scale trials. To minimize the social costs associated with such disruption, the Court felt compelled to limit official liability to cases where the reasonableness of official conduct could be determined objectively and unobtrusively.²⁴

Although the legal standards distinguishing the two levels of immunity have been refined, it remains unclear which level of immunity state parole board members should enjoy. In *Martinez v. California*,²⁵ the Supreme Court expressly reserved judgment on what level of immunity, if any, should be accorded parole board members in the course of their official duties.²⁶ Several courts of appeals have addressed the issue, with differing results. The Ninth Circuit, in *Sellars v. Procter*,²⁷ awarded parole board members absolute immunity from damage actions brought by prisoners for actions taken when processing alleged parole violations. The First, Fourth, Seventh, Eighth, and Tenth Circuits have largely followed the *Sellars* court's lead.²⁸ The Third Circuit has only partially accepted the majority ap-

Vietnam War); *Wood v. Strickland*, 420 U.S. 308 (1975) (school board members sued under § 1983 for alleged due process violations in connection with expulsion of students for "spiking" punch at the meeting of an extracurricular school organization). In *Scheuer*, the Court failed to define the full scope of qualified immunity, introducing instead the defense of "good faith." 416 U.S. at 247-48. In *Wood*, the Court attempted to provide a precise, two-pronged standard against which official conduct could be measured. The Court held that immunity would be denied if either: (1) the official knew or should have known her conduct would violate clearly established constitutional rights; or (2) the official acted with a malicious intent to violate the plaintiff's constitutional rights. 420 U.S. at 322.

The *Harlow* court effectively eliminated the second, subjective prong of the *Wood* test, and remanded the case to allow the parties to resolve the immunity issue in a motion for summary judgment. 457 U.S. at 819-20.

24. 457 U.S. at 817-18. For the implications of this standard for parole board officials, see notes 130-31 *infra* and accompanying text.

For a more complete account of the immunities granted to various government officials, see Kattan, *Knocking on Wood: Some Thoughts on the Immunities of State Officials to Civil Rights Damage Actions*, 30 VAND. L. REV. 941 (1977).

25. 444 U.S. 277 (1980).

26. 444 U.S. at 285 n.11.

27. 641 F.2d 1295 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981). In *Anderson v. Boyd*, 714 F.2d 906 (9th Cir. 1983), the Ninth Circuit extended this immunity to the imposition of parole conditions and parole revocation.

28. The Eighth Circuit closely followed the Ninth Circuit's lead. It first granted absolute immunity to parole board members "deciding to grant, deny, or revoke parole" in *Evans v. Dillahunt*, 711 F.2d 828, 831 (8th Cir. 1985). It then echoed *Anderson* by extending absolute immunity to board members carrying out official duties in *Gale v. Moore*, 763 F.2d 341 (8th Cir. 1985) (*per curiam*). Finally, the Court applied this principle to actions brought by injured third parties in *Nelson v. Balazic*, 802 F.2d 1077 (8th Cir. 1986) (parole board member entitled to absolute immunity in § 1983 damages action brought by three women kidnapped and sodomized by recent parolee).

The Seventh Circuit has been generous to parole officials by broadly defining their "official duties," thereby cloaking virtually all of their actions with absolute immunity. See, e.g., *Trotter*

proach. In *Thompson v. Burke*,²⁹ the court of appeals held that parole board members are entitled to absolute, quasi-judicial immunity when engaged in adjudicatory duties, but should receive only qualified immunity when engaged in administrative or executive duties.³⁰ But several courts of appeals have criticized this adjudicatory/administrative dichotomy as unrealistic and impracticable.³¹

This Note argues that neither the majority nor the minority approach is realistic. A thorough examination of the parole process and section 1983 litigation will show that a third approach is more appropriate — that parole board members are entitled only to *qualified* immunity for *all* actions taken within the scope of their official duties. Part I argues that parole board members should not enjoy absolute, quasi-judicial immunity because the parole board decisionmaking process is not “functionally comparable”³² to judicial decisionmaking. The differences in procedure, political accountability, training, and background lead to two very different systems. Part II shows that adopting qualified immunity will also improve the parole decisionmak-

v. Klinciar, 748 F.2d 1177, 1182 (7th Cir. 1984) (parole revocation and related actions are “part and parcel of the decision process” and thereby enjoy absolute immunity).

The First and Tenth Circuits followed *Sellars* with little variation. See *Johnson v. Rhode Island Parole Bd. Members*, 815 F.2d 5 (1st Cir. 1987); *Knoll v. Webster*, 838 F.2d 450 (10th Cir. 1988) (per curiam). The Fifth Circuit reached the same conclusion even before the Ninth Circuit pronouncement in *Sellars*. See *Pope v. Chew*, 521 F.2d 400 (4th Cir. 1975).

While noting the Ninth Circuit’s decision in *Sellars*, the Fifth Circuit has not explicitly relied upon that case in deciding that parole board members should enjoy absolute immunity for the decision to grant, deny, or revoke parole. See *Serio v. Members of La. State Bd. of Pardons*, 821 F.2d 1112 (5th Cir. 1987) (parole release hearings); *Farrish v. Mississippi State Parole Bd.*, 836 F.2d 969, 975 (5th Cir. 1988) (mentioning but not relying on *Sellars*). The scope of immunity in the Fifth Circuit for other actions is less clear. In *Henzel v. Gerstein*, 608 F.2d 654, 658-59 (5th Cir. 1979), the Fifth Circuit affirmed a summary judgment for a parole board member who allegedly interfered with a parolee’s business ventures on the ground of *qualified* immunity. The *Farrish* court expressed no opinion about the appropriate level of immunity for such conduct. 836 F.2d at 975.

Although the Court of Appeals for the Second Circuit has not yet addressed the immunity issue, at least one district court in that circuit has awarded absolute immunity to parole board members. See, e.g., *Jane Doe v. United Social & Mental Health Servs.*, 670 F. Supp. 1121, 1124-25 (D. Conn. 1987) (absolute immunity from damages suit brought by administrator of victim murdered by parolee). However, another district court was willing to pursue the adjudicative-administrative dichotomy employed by the Third Circuit. *Jones v. Coughlin*, 665 F. Supp. 1040, 1045-46 (S.D.N.Y. 1987) (absolute immunity for setting excessive parole conditions).

29. 556 F.2d 231 (3d Cir. 1977).

30. 556 F.2d at 236. See also *Harper v. Jeffries*, 808 F.2d 281, 284 (3d Cir. 1986).

31. See *Walker v. Prisoner Review Bd.*, 769 F.2d 396, 399 (7th Cir. 1985), *cert. denied*, 474 U.S. 1065 (1986) (arguing that even if adjudicatory/administrative distinction could be made, it could “only be delineated through burdensome litigation which would unduly disrupt the Board’s functions”); accord *Johnson v. Rhode Island Parole Bd. Members*, 815 F.2d at 7.

This Note does not separately address the practical difficulties that the minority approach may raise because, with respect to so-called “adjudicatory” actions of parole board members, that approach subscribes to the majority view that board members are similar to judges and require absolute immunity in order to preserve their independent judgment. Thus, this Note’s frontal attack on the majority view should be understood as a critique of the “adjudicatory function” aspect of the minority approach as well.

32. For a complete definition of this term see Part I.A *infra*.

ing process by fostering disincentives for unconstitutional conduct. Parole board members themselves would be more careful to respect well-established constitutional rights, and state government would be more likely to implement better selection, training, and risk-management procedures. Finally, Part III illustrates that limiting the immunity of parole board members is necessary to provide both monetary and symbolic relief to victims of unconstitutional conduct. Other forms of relief, such as habeas corpus, are inadequate to protect prisoners and parolees, and completely unavailable to victims. With no effective forms of relief, section 1983 rings hollow. But if parole board members are given only qualified immunity from suit, then section 1983 will serve the cause for which it was enacted — to compensate those whose constitutional rights have been violated. The road to this vindication of section 1983 begins with an exploration of the differences between parole boards and courts and the great differences between the players themselves: parole board members and judges.

I. PAROLE BOARDS AND THE "FUNCTIONAL" APPROACH TO SECTION 1983 IMMUNITY

Judges are given immunity from suit so that they will make impartial decisions uninfluenced by the possibility of personal liability. The basic assumption behind the majority and minority approaches to parole board member immunity is that parole board officials so closely resemble judges that at least some of their official conduct should be cloaked with absolute, quasi-judicial immunity, so that they too may be impartial decisionmakers. By first describing immunity doctrine and then comparing parole board members with judges, this Part will demonstrate that this fundamental assumption is groundless for two reasons. First, the parole process is far more bureaucratic than adjudicatory. Prisoners, if not wholly excluded from participation, play a minimal role in the system. Second, parole board members lack the political insularity and qualifications of judges. Removable at the governor's will, board members are political animals and often behave accordingly.

A. *The Test in Butz v. Economou*

The Supreme Court has developed two lines of analysis in determining the appropriate level of official immunity. The first considers the status of the office over the course of Anglo-American legal history. For example, in *Tenney v. Brandhove*,³³ the Supreme Court reasoned that the common law tradition of absolute immunity for legislators made it highly unlikely that the drafters of section 1983 could have intended to do away with that tradition without an express

33. 341 U.S. 367 (1951).

declaration of that intent.³⁴ Likewise, in *Pierson v. Ray*,³⁵ the Court accorded absolute immunity to judges because “[f]ew doctrines were more solidly established at common law” than judicial immunity.³⁶

Because this analysis is inapplicable to officials in positions of recent vintage, the Court developed a second line of analysis involving explicit policy considerations. Specifically, the Court began to weigh the private interests of compensation for and deterrence of constitutional wrongs against the public interest in preserving the independent judgment of state officials.³⁷ In *Butz v. Economou*,³⁸ the Supreme Court presented this analysis in its most refined and formulaic mode and established the prevailing approach to the question of parole board immunity.

Butz v. Economou involved a suit by a commodity futures merchant alleging that several officials in the U. S. Department of Agriculture had deprived him of his constitutional rights to free speech and procedural due process. The complaint stated that, in response to “sharply critical” remarks the plaintiff made, several departmental officials — including the Secretary of Agriculture, the assistant secretary, the chief hearing examiner and the judicial officer of the department — initiated administrative proceedings to revoke his registration as a futures merchant. Addressing the issue of the appropriate level of immunity for federal executive officials, the *Butz* Court stated that qualified immunity was the general rule.³⁹ A blanket rule of absolute immunity for executive officials would, the Court reasoned, effectively subordinate the constitutional interests of victims to the interests of those who caused the injuries.⁴⁰ Despite its announced

34. 341 U.S. at 376. See also *Owen v. City of Independence*, 445 U.S. 622, 637 (1980).

35. 386 U.S. 547 (1967).

36. 386 U.S. at 553-54. See also *Bradley v. Fisher*, 80 U.S. (13 Wall.) 646 (1872) (absolute immunity for federal judges). More recently, judicial immunity has come under increasing attack. See, e.g., Note, *Judicial Immunity and Judicial Misconduct: A Proposal for Limited Liability*, 20 ARIZ. L. REV. 549 (1978); Comment, *Judicial Immunity: An Unqualified Sanction of Tyranny from the Bench*, 30 U. FLA. L. REV. 810 (1978); Note, *Immunity of Federal and State Judges from Civil Suit — Time for a Qualified Immunity?*, 27 CASE W. L. REV. 727 (1977).

37. See, e.g., *Imbler v. Pachtman*, 424 U.S. 409, 424-25 (1976) (“The public trust of the prosecutor’s office would suffer if he were constrained in every decision by the consequences in terms of his own potential liability in a suit for damages.”). These policy considerations did not go unnoticed before the *Pierson* Court when it utilized the historical analysis of the issue of judicial immunity. Indeed, the Court underscored its decision with the observation that exposure to damages liability would result “not [in] principled and fearless decision-making but [in] intimidation.” 386 U.S. at 554.

38. 438 U.S. 478 (1978).

39. 438 U.S. at 507.

40. 438 U.S. at 505. The plaintiff in *Butz* brought his action against federal executive officials directly under the Constitution. Cf. *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). However, the Court stated that, for purposes of immunity doctrine, there was no distinction between suits brought under the Constitution against federal officials and those brought under § 1983 against state officials. 438 U.S. at 507. Thus, *Butz* is authoritative in § 1983 actions.

general rule of qualified immunity, the Court noted that "there are some officials whose *special functions* require a full exemption from liability."⁴¹ According to the Court, the nature of the official's function, rather than her particular location within the government, was the relevant consideration. For example, judges and those "functionally comparable" to them, such as grand jurors and prosecutors, required absolute immunity in order that they may undertake their duties free of "harassment or intimidation."⁴²

The Supreme Court also pointed out that the safeguards in the judicial process reduce the need for a private damages action as a means to deter unconstitutional conduct. The Court found several safeguards important: (1) the insulation of the judge from political influence, (2) the importance of precedent to judges resolving controversies, (3) the adversarial nature of the judicial process, and (4) the ability to correct error on appeal.⁴³

In applying the functional comparability test to the *Butz* defendants, the Court conducted a two-part inquiry. First, the Court asked whether the defendants exercised judge-like powers and whether the administrative proceedings over which they presided were similar to cases heard by judges. Second, the Court looked for the presence of numerous safeguards against unconstitutional conduct in the agency.⁴⁴

This second prong of the functional comparability test — the existence of safeguards preventing unconstitutional conduct — appears to be the essential foundation underlying absolute immunity:

In light of these safeguards, we think that the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women. We therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts.⁴⁵

Accordingly, determining which executive officials pass the functional comparability test and thus possess absolute, quasi-judicial immunity requires courts not only to compare the officials' powers and duties to those of judges, but also to look for the existence of institu-

41. 438 U.S. at 508 (emphasis added).

42. 438 U.S. at 512-13. Although credit for the "functional comparability" test is given to *Butz*, the term first appeared in *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976), discussed at note 37 *supra*.

43. 438 U.S. at 512.

44. 438 U.S. at 513-14. In particular, the Court found the following safeguards present in the administrative hearing: (1) adversarial proceedings, (2) political insularity of the trier of fact, (3) the record for decision consists exclusively of the pleadings, transcripts of testimony and exhibits, (4) availability to both parties of the findings of fact and law by the examiner, (5) ability of both parties to present oral or documentary evidence, (6) inability of the Hearing Examiner to discuss the controversy without first notifying the parties and offering them an opportunity to participate, and (7) availability of agency or judicial review.

45. 438 U.S. at 514 (emphasis added).

tional checks minimizing the risk of unconstitutional conduct.⁴⁶

B. *The Nature of the Parole Decisionmaking Process*

A careful examination of the various parole models employed by the states is a necessary first step in determining whether parole board members are so functionally comparable to judges that they deserve the blanket protection of absolute immunity.

The federal courts of appeals frequently discuss *Butz*, but devote little time and effort to investigating the nature of the parole decision-making process when applying it. A thorough investigation of the parole process reveals that it differs from the judicial decisionmaking process in several important respects.⁴⁷ First, parole systems vary greatly.⁴⁸ To subscribe to the notion that there is *one* parole system in some Platonic sense⁴⁹ is at best naive, and at worst intellectually dishonest. This diversity of systems is quite unlike the relative uniformity of the judiciary. Second, the selection, treatment, and consequent behavior of parole board members is very different from that of judges. These differences give rise to the need for differences in the level of immunity for each.

1. *The Decisionmaking Framework*

The parole systems in the United States roughly fall into two basic models: the discretionary system and the mandatory release system.⁵⁰ In the former, the parole board has full discretion in awarding and revoking parole. In the latter, the release decision is based upon statutory formulae.⁵¹

In the discretionary system, the parole board may have to follow

46. Branham, *State Parole Decisions: The Scope of Immunity Accorded Parole Board Members Under 42 U.S.C. § 1983*, 1983 S. ILL. U. L.J. 281, 294.

47. Unfortunately, the existing case law exhibits a tendency to make sweeping generalizations about the independence and integrity of parole board members. This tendency is not unique to the lower courts. The Supreme Court has also noted, in purely conclusory language, that parole boards are relatively "neutral and detached" hearing bodies. See *Cleavinger v. Saxner*, 474 U.S. 193, 204 (1985) (prison disciplinary committee less impartial than parole board); *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (parole board is "neutral and detached" hearing body).

48. See *Mason v. Melendez*, 525 F. Supp. 270, 277 (W.D. Wis. 1981):

[S]ome members of some parole departments promulgate the conditions to be imposed upon parolees, some supervise and counsel with parolees, some investigate possible violations of conditions of parole, some recommend termination of parole and others order the termination, some promulgate the standards by which parole is to be granted or withheld, some recommend the grant of parole and others order it granted.

49. The reference here is to Plato's theory of Forms, or Ideas. Specifically, it refers to the metaphysical component of that theory, which maintains that a word like "table" denotes a certain *ideal* table — unvarying and eternal in space and time. See PLATO, *THE REPUBLIC*, Book X, 522 (B. Jowett trans. 1944).

50. See Branham, *supra* note 46, at 295-97.

51. This model is beyond the focus of this Note, which is concerned with the consequences of discretionary acts of parole board members. It need only be said that these systems would not

some statutory decisionmaking standards for parole decisions, but these guidelines tend to be minimal and open-ended.⁵² More often, departmental tradition dictates what criteria are to be used.⁵³ Parole board members may collect and review a whole range of information. For example, they may consider, in addition to the circumstances of the crime and the inmate's record, the following factors: (1) physical and psychological reports, (2) familial relationships and community ties, and (3) institutional reports about the inmate's prison activities and/or misconduct.⁵⁴ These reports may contain unverifiable information such as guard observations and rumors about the prisoner heard by correctional officials.⁵⁵ This lack of evidentiary rigor in a

generate § 1983 litigation against *board members* who were merely obeying a statutory command; instead, litigation would challenge the statute itself.

52. See, e.g., KAN. STAT. ANN. § 22-3717(e) (1981 & Supp. 1986) (parole rests in opinion of parole board); ILL. ANN. STAT. ch. 38, 1003-3-5(c)(1-3) (Smith-Hurd 1982) (parole may be denied if parole board determines there is a *substantial* risk prisoner cannot follow conditions of parole, if release would belittle the gravity of the offense, or if release would *substantially* impair penal discipline); N.Y. EXEC. LAW § 259-i(2)(c) (McKinney 1982) (release permitted if there is a *reasonable probability* that inmate will not violate the law, if release is "not incompatible with the welfare of society," and if parole would not deprecate the gravity of the offense); MO. REV. STAT. § 217.690 (1986) ("When in its opinion there is reasonable probability that an inmate . . . can be released without detriment to the community or to himself, the board may *in its discretion* release or parole such person . . .") (emphasis added). ALA. CODE § 15-22-26 (1982) (same); COLO. REV. STAT. § 17-2-201(4)(a) (1986) (same); NEV. REV. STAT. § 213.1099(1)(a-b), (3) (1986) (same with exception for death and life without parole sentence); R.I. Gen. Laws § 13-8-14 (1956) (same); ALASKA STAT. § 33.16.100 (1986) (same), GA. CODE ANN. § 42-9-42(c) (1985) (same); VA. CODE ANN. § 53.1-136(4) (1982) (same); ARK. CODE ANN. § 16-93-201(f)(1) (1987) (board has complete discretion); N.M. STAT. ANN. § 31-21-25(D) (1978) (complete discretion).

53. See, e.g., ARK. CODE ANN. § 16-93-201(f)(4) (1987) ("All policies, rules, and regulations regarding parole shall be formulated by the Parole Board . . ."); N.M. STAT. ANN. § 31-21-25(D) (1978) (same).

54. See ALA. CODE § 15-22-25(a) (1982); ALASKA STAT. § 33.16.110 (1986); ARK. CODE ANN. § 16-93-203 (1987); GA. CODE ANN. § 42-9-43 (1985 & Supp. 1987); NEB. REV. STAT. § 83-1,115 (1987); VA. CODE ANN. § 53.1-155 (1982 & Supp. 1987); ILL. ANN. STAT. ch. 38, 1003-3-4(d)(5) (Smith-Hurd 1982 & Supp. 1987); Grimm v. Arizona Bd. of Pardons and Paroles, 115 Ariz. 260, 564 P.2d 1227, 1234 (1977) (en banc).

55. See N. COHEN & J. GOBERT, THE LAW OF PROBATION AND PAROLE 144 (1983). The Supreme Court has given the introduction of such information its imprimatur. In Gagnon v. Scarpelli, 411 U.S. 778 (1973), the Supreme Court, after finding no difference between probation and parole revocation for constitutional purposes, 411 U.S. at 782 & n. 3, noted:

[A] criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation hearing, on the other hand, the State is represented not by a prosecutor, but by a parole officer . . . ; *formal procedures and rules of evidence are not employed*; and the members of the hearing body are familiar with the problems and practice of probation or parole.

411 U.S. at 779 (emphasis added).

One result of this relaxed standard is that otherwise inadmissible hearsay evidence may be considered in parole revocation hearings. See United States v. Miller, 514 F.2d 41 (9th Cir. 1975) (per curiam); State v. Marrapese, 122 R.I. 494, 409 A.2d 544 (1979); Ward v. Parole Bd., 35 Mich. App. 456, 192 N.W.2d 537 (1971). However, courts have been reluctant to permit hearsay evidence to stand as the sole ground for a board's decision. See Anaya v. State, 96 Nev. 119, 606 P.2d 156 (1980); People v. Lewis, 28 Ill. App. 3d 777, 329 N.E.2d 390 (1975).

parole release or revocation proceeding is an important distinction between such hearings and judicial proceedings.

In some instances, the prisoner himself may provide information to the parole board.⁵⁶ Because most state statutes do not require a personal appearance before the board, this information is usually written.⁵⁷ This procedure stands in stark contrast to the right of the accused to be heard in a judicial proceeding.⁵⁸

The brief and informal nature of the hearing itself produces a nonadversarial atmosphere. In many cases the inmate does not make a personal appearance before the board,⁵⁹ and even when the inmate does appear, he often has little chance to do more than field questions fired at him from across the table.⁶⁰ Studies have shown that the parole board hearings tend to last only a few minutes from the time the prisoner enters the room until a preliminary determination is made.⁶¹ Moreover, only a few jurisdictions permit an attorney to accompany the inmate;⁶² and even where it is permitted, few prisoners can afford private counsel at parole hearings after incarceration for several years, so any state-created right to counsel has little meaning.⁶³

One feature of some systems is the requirement that the board provide a written record of the reasons supporting its parole decision.⁶⁴ However, review of the board's decision may be quite limited. In New York, for example, judicial review of parole board actions is unavailable if the actions are taken "in accordance with law."⁶⁵ When judicial

56. See ALASKA STAT. § 33.16.110(a)(2), (7) (1986); NEB. REV. STAT. § 83-1, 115(6) (1987); see also OKLA. STAT. tit. 57, § 349.3 (1981).

57. See Branham, *supra* note 46, at 296. Although most states have not granted prisoners the right to attend parole hearings, an increasing number have granted a right of attendance to victims. See *Victim's Relatives Opposing Parole*, N.Y. Times, Apr. 26, 1987, at 29, col. 1 (number of states granting victims attendance rights rising from 6 in 1982 to 33 by 1986).

58. See U.S. CONST. amend. VI.

59. See note 57 *supra* and accompanying text.

60. Indeed, the statutes typically grant the prisoner an "interview." See, e.g., COLO. REV. STAT. § 17-2-201(9)(a)(I) (1986); MO. REV. STAT. § 217.690(3) (1986).

61. Averages vary from state to state. Two states with more thorough systems, Michigan and Wisconsin, have been known to spend an average of 10-20 minutes per hearing. At the other end of the spectrum, the Kansas system was reported to devote an average of 2-3 minutes per inmate, leading to as many as 135 hearings a day. See Dawson, *supra* note 3, at 171. See also ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 96-97 (1972) (New York parole board spending average of 5.9 minutes per prisoner hearing).

62. See OR. REV. STAT. § 144.123 (1987) (inmate may be accompanied by any one person of his choice); cf. NEB. REV. STAT. § 83-1,112(2) (1980) (inmate may consult anyone, including legal counsel, in preparing for hearing).

63. Occasionally, law students have assisted in representing prisoners free of charge. See *Pope v. Chew*, 521 F.2d 400 (4th Cir. 1975). Of course, the effectiveness of such representation is open to question.

64. See ILL. REV. STAT. ch.38, ¶ 1003-3-5(f) (1987); N.Y. EXEC. LAW § 259-i(2)(a) (McKinney 1982 & Supp. 1988) (board must provide reasons for denial of parole); N.M. STAT. ANN. § 31-21-25(C) (1978 & Supp. 1987) (same).

65. N.Y. EXEC. LAW § 259-i(5) (McKinney 1982 & Supp. 1988). Cf. COLO. REV. STAT. § 17-2-201(9)(c) (1986 & Supp. 1987) (prisoner appeal of revocation limited to board itself).

review is permitted, a marked deference to parole boards is easy to detect.⁶⁶ In most cases, an inmate's only hope for review is the possibility that the entire parole board may review the hearing panel's actions.⁶⁷

With these details of the parole decisionmaking framework in mind, it becomes apparent that the settings for parole board and judicial decisionmaking are quite different. This dissimilarity is also reflected in the decisionmakers themselves. The following discussion points out the many differences between board members and judges: differences in political accountability, status, tenure, and qualification.

2. Parole Board Members

The selection and treatment of parole board members play a large role in shaping the parole process. Parole board members belong to the executive branch which, unlike the state judiciary, generally enjoys only qualified immunity.⁶⁸ Operating under the governor, parole board members are far more vulnerable to political pressures than judges. As a consequence, their approach to decisionmaking is quite different from that of judges.

The parole board members themselves are typically selected by gubernatorial appointment subject to legislative approval.⁶⁹ The term of appointment ranges from three to six years,⁷⁰ although governors generally are empowered to remove board members.⁷¹

66. See P. CROMWELL, G. KILLINGER, H. KERPER & C. WALKER, *PROBATION AND PAROLE IN THE CRIMINAL JUSTICE SYSTEM* 207 (2d ed. 1985) [hereinafter *PROBATION AND PAROLE*] ("[T]he prevailing view of the courts has been one of noninterference in parole release decisions."); see also LEGISLATIVE BUDGET AND FINANCE COMMITTEE, PENNSYLVANIA GENERAL ASSEMBLY, *A SUNSET PERFORMANCE AUDIT OF THE PENNSYLVANIA BOARD OF PROBATION AND PAROLE PURSUANT TO ACT 1981-142*, 36 (Dec. 1984) [hereinafter *SUNSET AUDIT*] (only 1.3% of a random sample of parole board decisions overruled between 1980-1984).

67. Branham, *supra* note 46, at 297. Of course, prisoners may seek other remedies, such as habeas corpus relief. However, no such alternatives exist for victims of wrongfully released parolees.

68. See *Butz v. Economou*, 438 U.S. at 507; note 39 *supra* and accompanying text.

69. ALA. CODE § 15-22-20(b) (1982); ALASKA STAT. § 33.16.020 (1986); ARK. CODE ANN. § 16-93-201(a)(1) (1987); COLO. REV. STAT. § 17-2-201(1)(a) (1986 & Bradford Supp. 1987); GA. CODE ANN. § 42-9-2(a) (1985); ILL. REV. STAT. ch. 38, 1003-3-1(b) (1987); MO. REV. STAT. § 217.665(1) (1986); NEB. REV. STAT. § 83-189 (1987); N.M. STAT. ANN. § 31-21-24(A) (1978 & Supp. 1987); N.Y. EXEC. LAW § 259-b(1) (McKinney 1982 & Supp. 1988); VA. CODE ANN. § 53.1-134 (1982 & Michie Supp. 1987). In Nevada the governor alone makes the appointment. NEV. REV. STAT. § 213.108(2) (1986).

70. See, e.g., N.M. STAT. ANN. § 31-21-24(B) (1978) (three years); R.I. GEN. LAWS § 13-8-1 (1981) (three years); FLA. STAT. § 947.03(1) (1987) (four years); OR. REV. STAT. § 144.005(2)(1987) (four years); ALASKA STAT. § 33.16.020(b) (1986) (five years); ARK. CODE ANN. § 16-93-201(a)(3) (1987) (five years); ALA. CODE § 15-22-20(c) (1982) (six years); MO. REV. STAT. § 217.665(3) (1986) (six years); ILL. REV. STAT. ch. 38, 1003-3-1(c) (1987) (six years); N.Y. EXEC. LAW § 259-b(1) (McKinney 1982 & Supp. 1988) (six years); S.C. CODE ANN. § 24-21-10 (Law. Co-op. 1976 & Supp. 1987) (six years).

71. See, e.g., ARK. CODE ANN. § 16-93-201(d) (1987) (removal for "cause"); COLO. REV. STAT. § 17-2-201(1)(a) (1986 & Supp. 1987) (removal for incompetency, neglect of duty, malfea-

It is precisely this threat of removal that introduces the political element into the process. In Virginia, for example, members are reminded by statute that they "serve at the pleasure of the Governor."⁷² In most states, the pressure is less explicit, but equally palpable. For example, California Deputy Attorney General Anthony Dicce once professed that gubernatorial pressure is felt by all parole board members, even those appointed by a previous administration:

The board is always subject to some degree of politics because board members are always appointed by the governor If you or I were on the board and wanted to get appointed again, and got an impression of how the governor felt, we might behave accordingly.⁷³

Dicce's point is well made. Because the criminal justice system involves powerful political issues, parole board members' livelihood depends on whether they are an asset or liability to the administration.⁷⁴ As a result, parole board members are prone to bend to community pressure in connection with decisions to award or deny parole to notorious criminals. Periodically, the political stature of parole boards has permitted popular opinion to effect dramatic reversals in policy.⁷⁵

The susceptibility of board members to political pressures is exac-

sance, failure to use state risk assessment guidelines or failure to attend meetings); FLA. STAT. § 947.03(3) (1987) (removal for malfeasance, neglect of duty, drunkenness, incompetence, permanent inability to perform duties, or pleading or being found guilty of a felony); ILL. REV. STAT. ch. 38, 1003-3-1(c) (1987) (removal for "cause"); N.M. STAT. ANN. § 31-21-24(C) (1978 & Supp. 1987) (removal for incompetency, neglect of duty, or malfeasance). N.Y. EXEC. LAW § 259-b(6) (McKinney 1982) (removal for "cause"); OR. REV. STAT. § 144.005(2) (1987) (removal for "inefficiency, neglect of duty or malfeasance in office") (emphasis added); S.C. CODE ANN. § 24-21-11 (Law. Co-op. 1976 & Supp. 1987) (governor may remove for "misconduct, neglect of duty, malfeasance, misfeasance, or nonfeasance," but must afford board member opportunity to be heard); VA. CODE ANN. § 53.1-134 (1982 & Supp. 1987) ("The members of the Parole Board shall serve at the pleasure of the governor."). Because the power of removal is very broad, "it is not unusual to have a new board appointed when a new governor takes office." PROBATION & PAROLE, *supra* note 66, at 168.

72. VA. CODE ANN. § 53.1-134 (1982 & Supp. 1987).

73. Girdner, *supra* note 1, at 1, col. 6.

74. See, e.g., PROBATION AND PAROLE, *supra* note 66, at 168 ("[I]t is not unusual to have a new board appointed when a new governor takes office."); *Cuomo Fails Third Time to Replace Parole Chief*, N.Y. Times, Feb. 7, 1984, at B2, col. 5 (New York governor seeking to replace chairman of State Board of Parole critical of his criminal justice initiatives); *Cuomo Names Youth Division Official to Head Parole Board*, N.Y. Times, Feb. 22, 1984, at B1, col. 6. (named successor to Chairman of State Parole Board promising, "Clearly, you're going to see a marked reduction in the number of people paroled.").

75. The *Fain* case in California serves as a good example. In 1982, the California Board of Prison Terms paroled convicted murderer and rapist William Archie Fain. Fain had served 15 years of his sentence as an ideal prisoner and had become a born-again Christian. After the family of one of Fain's victims collected over 62,000 signatures on petitions protesting the action, the board rescinded Fain's parole. See Leland, *Politics, the Public and Parole*, CAL. LAW., Apr. 1984, at 16-17; Girdner, *supra* note 1; see also Wasik & Pease, *The Parole Veto and Party Politics*, 86 CRIM. L. REV. 379-82 (June, 1986); *Political Pressures Cited in New York Parole Case*, 17 CRIM. JUS. NEWSL. 6 (Feb. 3, 1986).

Occasionally, parole board members themselves admit that their traditionally political positions distinguish them from the judiciary. See text at note 1 *supra*.

erbarated by their professional standing. In the first place, they do not enjoy the prestige and respect accorded to judges. In fact, over one half of the parole board members in this country are part-time employees.⁷⁶ Thus, many parole board members have two bosses — the governor and the private employer — who may have something to say about the politics of parole. By contrast, state judges, even elected ones, are insulated from such daily pressures. As one parole board member put it, "We're not judges. We don't have the same independence."⁷⁷

In the second place, parole board members have a stronger personal incentive to maintain the correct political line. It is unlikely that many parole board members have the educational background of judges.⁷⁸ The implications of this disparity upon relative opportunities for jobs of equal pay⁷⁹ or status (*i.e.*, a government post) are obvious. Put frankly, board members have more to lose than judges.

Clearly, all of these factors undermine the perception that parole boards are detached hearing bodies. Unlike courts, parole boards usually have little statutory guidance in the factors which should be considered in release decisions. There are few evidentiary requirements, and procedural due process safeguards are greatly diminished. The parole board members themselves are subject to far more political pressure than judges, but at the same time, they are given almost as much authority over the lives of prisoners. Keeping these differences in mind, a more enlightened application of the functional comparability test may now be undertaken.

C. *Applying the Functional Comparability Test to State Parole Boards*

Having investigated the details of the parole process, a comparison

76. See PROBATION AND PAROLE, *supra* note 66, at 168. Moreover, a number of states pay board members so poorly that a second job is a necessity. See, e.g., ARK. CODE ANN. § 16-93-201(C)(1) (1987) (salary \$60 per working day plus travel expenses); OKLA. STAT. tit. 57, § 332.5 (1981 & Supp. 1987) (annual salary \$3,600 plus travel expenses).

77. Girdner, *supra* note 1, at 1, col. 6.

78. In Pennsylvania for example, there are no minimum education or experience requirements for membership on its five-member parole board. See SUNSET AUDIT, *supra* note 66, at 26. By contrast, the New York Parole Board requires a bachelor's degree in the fields relating to law or sociology or five years of corrections experience. Pennsylvania's lack of requirements is hardly unique. Many other states either have no education experience requirement at all, see, e.g., ARK. CODE ANN. § 16-93-201(a)(2) (1987); FLA. STAT. § 947.01 (1987); GA. CODE ANN. § 42-9-2 (1985); NEV. REV. STAT. § 213.108 (1987); OKLA. STAT. tit. 57, § 332 (1981), or merely require that members be "qualified," see, e.g., ALA. CODE § 15-22-20(b) (1982); MO. ANN. STAT. § 217.665(2) (Vernon 1983 & Supp. 1988); NEB. REV. STAT. § 83-189 (1987) (all five members need to be of "good character and judicious temperament" and at least one member must have a professional background in corrections); N.M. STAT. ANN. § 31-21-24 (1978 & Supp. 1987). See N.Y. EXEC. LAW § 259-(b)(2) (McKinney 1982 & Supp. 1988).

79. The strength of this incentive, of course, varies from state to state. Compare MO. ANN. STAT. § 217.665(7) (Vernon 1983 & Supp. 1988) (\$45,000 annual salary) with OKLA. STAT. tit. 57, § 332.5 (1981 & Supp. 1987) (\$3,600 annual salary).

between it and the judicial system in accordance with *Butz v. Economou* is in order. The earlier efforts by the courts of appeals to make such comparisons failed to include a thorough discussion of the many differences between parole board hearings and judicial proceedings discussed above. In this section, a faithful application of the functional comparability test reveals that parole board members fail to meet the *Butz* requirements.

1. *Of Boards and Benches: The Wooden Approach of Sellars*

Consideration of the inadequacies of the prevailing judicial approach to parole board member immunity illustrates why a new application of the functional comparability test in this context is required. The discussion in the leading case on the issue, *Sellars v. Procunier*,⁸⁰ leaves much unanswered.

As mentioned earlier,⁸¹ *Sellars v. Procunier* has been so well received by other courts of appeals that they have opted to quote major portions of it rather than embark upon the *Butz* inquiry themselves.⁸² *Sellars* involved a section 1983 action brought by an inmate against members of the California Adult Authority.⁸³ The plaintiff alleged that the defendants denied parole in retaliation for the plaintiff's expression of his political views, thereby violating his constitutional rights under the first, fifth, sixth, eighth, and fourteenth amendments.⁸⁴

In addressing the immunity issue, the court recognized that *Butz* required it not only to examine an official's location within the superstructure of the government,⁸⁵ but also to examine the official's function. Applying the first prong of the *Butz* test — whether the official performs an adjudicatory function — the court first stated that the "daily task" of judges and parole board members is the same: adjudication of given cases. Next, the court concluded that the two entities have the same primary duty: to deliver impartial decisions that may affect an individual's liberty. Finally, the court concluded that the risk of "constant unfounded suits" from disappointed participants was the

80. 641 F.2d 1295 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981).

81. See text at note 28 *supra*.

82. See, e.g., *Johnson v. Rhode Island Parole Bd. Members*, 815 F.2d 5 (1st Cir. 1987) (*per curiam*); *United States ex rel. Powell v. Irving*, 684 F.2d 494 (7th Cir. 1982).

83. 641 F.2d at 1297. California later repealed its Indeterminate Sentence Law, which permitted the Adult Authority to fix prison terms and set parole release dates for every state convict. The legislature replaced the law with the Determinate Sentence Law, under which trial judges set prison terms in light of statutory guidelines. See CAL. PENAL CODE § 1170 (Deering 1971 & Supp. 1988). The legislature also replaced the Adult Authority with the Board of Prison Terms. See CAL. PENAL CODE § 5078 (Deering 1980).

84. 641 F.2d at 1297-98.

85. It is critical to note that this factor weighs *against* absolute immunity. The *Butz* Court noted that the general rule for the class of executive officials — the class to which parole boards belong — is qualified immunity. 438 U.S. at 507.

same for courts and boards.⁸⁶

After expressing its concern that exposure to numerous meritless lawsuits would hamper the parole process, the court applied the second prong of the *Butz* test. After looking for institutional safeguards against unconstitutional conduct, the court concluded that three existed: (1) parole decisions were subject to habeas corpus challenges; (2) California prisoners had a right to apply for parole and due consideration thereof; and (3) California prisoners had a right to a written statement explaining why parole was denied.⁸⁷ The *Sellars* court concluded that "such safeguards, especially the right to habeas corpus relief, are sufficient to protect petitioner's constitutional rights."⁸⁸

Although it applied a relatively new line of analysis, the *Sellars* court had arrived at a conclusion reached in the Ninth Circuit a decade earlier: absolute immunity should be given to officials processing parole applications.⁸⁹ As the following discussion demonstrates, application of the two-pronged test in light of the differences between parole boards and courts yields a different result.

2. *The Failure of Parole Boards To Satisfy the Functional Comparability Test*

The flaw in *Sellars* is clear. The court considered basic similarities between parole board members and judges to the exclusion of all else.⁹⁰ A more complete method of comparison, one taking *dissimilarities* into account, demonstrates that parole board members and judges are not functionally comparable, but are, in fact, two drastically different creatures.

a. *The first prong.* The first prong of the functional comparability test — whether parole board members perform an "adjudicatory function"⁹¹ — requires an examination of *all* actions performed by parole board members, not only those resembling judicial actions. This examination reveals that there are, in fact, several significant differences in the adjudicatory functions performed by judges and parole board members.

The first difference is that parole board members are less likely to act impartially than judges. This distinction is important because an

86. 641 F.2d at 1302-03.

87. 641 F.2d at 1303.

88. 641 F.2d at 1304.

89. See *Allison v. California Adult Auth.*, 419 F.2d 822, 823 (9th Cir. 1969); *Villalobos v. Dickson*, 406 F.2d 835, 835 (9th Cir. 1969) (per curiam); *Bennett v. People*, 406 F.2d 36, 39 (9th Cir.), cert. denied, 394 U.S. 966 (1969); *Silver v. Dickson*, 403 F.2d 642, 643 (9th Cir. 1968), cert. denied, 394 U.S. 990 (1969).

90. Indeed, such superficial analysis brings to mind the old saw that a mouse closely resembles an elephant because both animals are gray, have disproportionately large ears, and thin tails. Such a method of comparison is obviously wooden and incomplete.

91. 438 U.S. at 514.

environment of official bias can serve as a breeding ground for unconstitutional conduct. Because one of the purposes of section 1983 is to deter such conduct, it should apply to the class of officials most likely to engage in it.⁹²

The primary reason that parole board members are less likely to be as impartial as judges is that they are markedly more vulnerable to political pressures. Two pressures are brought to bear on parole board members: pressure from superiors, and pressure from the public. The power and inclination of state governors to remove members for politically unpopular decisions is well documented.⁹³ Unlike the executive branch hearing examiners in *Butz v Economou*, parole board members are subject to removal by a political official rather than a neutral body such as a civil service commission.⁹⁴ In addition, because criminal corrections is a volatile public issue, parole board officials receive pressure to make decisions in accordance with public sentiment.⁹⁵

The significance of this difference between executive officials and judges has been misunderstood. For example, one commentator has suggested that the importance of this difference lies in society's expectations of official conduct. According to this view, judges are expected to be impartial, but executive officials are not because "[p]olitical influences [are] commonly known [to] permeate the executive decision-making process." From this premise it is argued that because there is no expectation of impartiality, victims of executive officials' conduct will feel less affronted and less anxious to file suit. Thus, the argument goes, because executive officials will be less likely targets for lawsuits, they deserve less protection from suit than judges.⁹⁶

Though seductive in its simplicity, this argument is unsatisfactory for two reasons. First, it rests on the dubious assumption that the primary motivation for section 1983 suits is a disappointed expectation of an official's impartiality. A more likely motivation is anger at the occurrence of what the plaintiff perceives as a wrong done her at the hands of a state official.⁹⁷ A person illegally searched and arrested by a police officer — an executive official — will not feel any less injured

92. Cf. Zagrans, "Under Color of" What Law: *A Reconstructed Model of Section 1983 Liability*, 71 VA. L. REV. 499, 588-89 (1985) (emphasis added):

The primary purpose of section 1983 is not solely remedial; it was enacted to deter the enforcement of improper state laws and customs. Providing a remedy against the user of such state laws was a means, not an end. . . . *The only kind of state process that can fulfill the purpose of section 1983 and properly displace a section 1983 action is one that prevents the harm from occurring.*

93. See notes 72-74 *supra* and accompanying text.

94. For an account of the governor's political influence, see notes 69-74 *supra* and accompanying text.

95. See, e.g., note 75 *supra* and accompanying text.

96. See Branham, *supra* note 46, at 298-99.

97. See Cass, *Damage Suits Against Public Officers*, 129 U. PA. L. REV. 1110, 1155-56 (1981).

or inclined to file suit because she recognizes that politics permeate the executive branch.

The argument is unpersuasive for a second reason. The implicit assumption that likelihood of civil suit is the sole criterion in determining which level of immunity officials "deserve" is equally suspicious. The test in *Butz v. Economou* indicates that the immunity inquiry is far more sophisticated, taking into account the existence of safeguards reducing the need for private damage actions as a means for deterring unconstitutional conduct. Such safeguards include insulation from political influence, the adversary nature of the process, and the ability to correct error on appeal.⁹⁸ The assumption is also counterfactual because it ignores the reality of executive official immunities. For example, although police officers and members of prison disciplinary boards are frequently the targets of section 1983 damages actions, they enjoy only qualified immunity.⁹⁹ Thus, the argument that executive officials require a lower level of immunity because they are less likely to be sued is neither theoretically nor empirically sound.

Another important difference between parole board members and judges is that the board members are either required or allowed to conduct investigations of parole candidates themselves.¹⁰⁰ Indeed, in this respect, parole board members resemble police officers or prosecutors, who enjoy only qualified immunity for investigatory conduct.¹⁰¹ Other differences exist as well: Many parole board members are only part-time professionals, and many parole boards are subject to no edu-

98. See 438 U.S. at 512. See generally Part I.A *supra*.

99. See *Pierson v. Ray*, 386 U.S. 547, 555 (1967) (police officers); *Cleavinger v. Saxner*, 474 U.S. 193, 206-07 (1985) (members of prison disciplinary boards).

100. See, e.g., *Branham*, *supra* note 46, at 301; GA. CODE ANN. § 42-9-43 (1985 & Supp. 1987) (board may conduct any investigation it deems necessary); N.M. STAT. ANN. § 31-21-25 (b)(2) (1978) (same).

101. See *Pierson v. Ray*, 386 U.S. at 555 (police officers enjoy qualified immunity).

Other courts and commentators have addressed the level of immunity for investigatory acts of prosecutors. See *United States v. Heldt*, 668 F.2d 1238, 1276 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 926 (1982); *Gray v. Bell*, 542 F. Supp. 927 (D.D.C. 1982), *affd.*, 712 F.2d 490 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984). See generally Comment, *District and Prosecuting Attorneys: Absolute Immunity Granted to Prosecutors Is Limited to Quasi-Judicial Acts*, 20 WASHBURN L.J. 630 (1981); Comment, *Section 1983 and the Limits of Prosecutorial Immunity*, 56 CHI.-KENT L. REV. 1029 (1980).

This bifurcated approach to prosecutor immunity — *absolute* immunity for case preparation and *qualified* immunity for investigatory conduct — would seem to support the Third Circuit's approach to parole board immunity. See text accompanying notes 30-31 *supra*. However, the Third Circuit has never considered, much less employed, this analogy in its parole board immunity decisions.

As it turns out, this analogy is problematic. Unlike prosecutors, parole board members do more than prepare cases; they decide them. Board members on a hearing panel may be, if not completely biased, at least disinclined to challenge unsubstantiated claims made by their colleagues. Thus, the risk of tainted decisionmaking is greater in the context of parole hearings than in judicial proceedings, where the decisionmaker (judge or jury) forms its first impression during the proceeding.

cational requirements whatsoever.¹⁰²

Leaving these fundamental dissimilarities aside, careful analysis reveals that the few characteristics shared by parole board members and judges are also shared by officials enjoying only qualified immunity. For example, the duty to decide highly emotional controversies in which impartiality is demanded of the decisionmaker is shared not only by parole board members and judges, but also by other public officials, such as school board members and prison disciplinary officials. The latter two officials, despite this shared characteristic, are not considered quasi-judicial and thus enjoy only qualified immunity.¹⁰³ Clearly then, the requirement of impartial decisionmaking is not indicative of a quasi-judicial function.

Similarly, parole board members and judges share with other officials enjoying qualified immunity the risk of unfounded suits by dissatisfied parties. Indeed, *any* government official making decisions in highly volatile situations faces the risk of a "spite" suit.¹⁰⁴ Yet this has not been sufficient to mandate absolute, quasi-judicial immunity for all government officials. As mentioned earlier, police officers enjoy only qualified immunity from section 1983 damages actions.¹⁰⁵ The very features that parole board members have in common with judges are shared by other officials, but these other officials are not considered functionally comparable to judges. In light of the differences described, parole board members and judges are also not functionally comparable.

Two points in this application of the first prong of the *Butz* test should now be clear. First, parole board officials are by nature political animals: acting, thinking and functioning quite differently from judges. Second, the few similarities parole board members share with judges are also shared by other officials enjoying *qualified* immunity.

102. See notes 76-78 *supra* and accompanying text.

103. See *Wood v. Strickland*, 420 U.S. 308 (1975); *Cleavinger v. Saxner*, 474 U.S. 193 (1985). For a full discussion of *Wood*, see Kattan, *supra* note 24, at 975-78.

104. See Cass, *supra* note 97, at 1155-56 (emphasis added) (footnotes omitted):

[T]wo features of government action may make the initiation of such "spite" suits against officials peculiarly likely. First, many government officials are vulnerable to personal suit because they exercise power over others directly and visibly: . . . the *policeman* who arrests a suspect, and the judge who passes sentence all are clearly identifiable as individuals whose actions operate immediately against a likely complainant. . . . Second . . . governmental action is frequently coercive in nature, intruding on individuals who may have resisted contact with those officials.

See also Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 294-95 (those most susceptible to damage actions are "street level" officials such as police officers, social workers, or parole officers); see generally P. SCHUCK, *SUING GOVERNMENT* (1986).

To argue that nonjudicial officials are as likely to be the subjects of "spite" suits as judges is not to say that this likelihood is very high at all. Indeed, the available empirical evidence indicates that this likelihood is not at all significant. See Part II *infra*.

105. See note 99 *supra* and accompanying text.

In short, parole board members fail to satisfy the first prong of the *Butz* test.

b. The second prong. The thrust of the second prong of the *Butz* test — the existence of institutional safeguards from unconstitutional conduct — is obvious. Section 1983 was itself designed to deter unconstitutional conduct¹⁰⁶ and should apply where needed. Consideration of the nearly complete absence of three important safeguards from the parole process — political insularity of the decisionmaker, adversary proceedings, and ability to correct error upon appeal — reveals an urgent need to permit section 1983 damages as a means of deterring unconstitutional acts by parole board members.

Much has already been said about the first safeguard emphasized by the *Butz* Court: political insularity of the decisionmaker.¹⁰⁷ In light of the apparent willingness of board members to respond to both popular and gubernatorial pressure, it seems fair to say that in general, parole board members view themselves as political actors and behave accordingly.¹⁰⁸

A second safeguard important to this prong of the *Butz* test — adversary proceedings — is also conspicuously absent from the parole decisionmaking process. Indeed, the Supreme Court has explicitly recognized that parole hearings are of a completely different cast than adversary proceedings. In *Gagnon v. Scarpelli*, the Supreme Court remarked upon the contrast between courtroom proceedings and parole revocation hearings:

The introduction of counsel into a revocation proceeding [would] alter significantly the nature of the proceeding. . . . The role of the hearing body itself, aptly described in *Morrissey* as being "predictive and discretionary" as well as factfinding, may become more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual probationer or parolee.

* * *

[A] criminal trial under our system is an adversary proceeding with its own unique characteristics. In a revocation proceeding, on the other hand, the State is represented, not by a prosecutor, but by a parole officer . . . ; formal procedures and rules of evidence are not employed; and the members of the hearing body are familiar with the problems and practice of probation or parole.¹⁰⁹

106. See note 92 *supra* and accompanying text.

107. See notes 68-77 *supra* and accompanying text.

108. See text at note 73 *supra*. See generally section I.A.2 *supra*.

109. 411 U.S. 778, 787-89 (1973) (superseded by statute as stated in *Baldwin v. Benson*, 584 F.2d 953 (10th Cir. 1978)). Although *Gagnon* dealt with the revocation of probation, the Court found no relevant difference between probation and parole revocation with respect to constitutional issues. 411 U.S. at 782 & n.3. See also *Hyser v. Reed*, 318 F.2d 225, 237 (D.C. Cir.), 442 U.S. 1, 9-10, *cert. denied*, 375 U.S. 957 (1963) ("[T]here is not the attitude of adverse, conflicting objectives as between the parolee and the Board [in a revocation hearing] inherent between prosecution and defense in a criminal case."); *Menechnino v. Oswald*, 430 F.2d 403, 412 (2d Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971) ("In the last analysis the Board's determination as to

The Supreme Court has also noted that parole release hearings are of an even less adversarial nature than parole revocation hearings.¹¹⁰ Thus, to characterize *any* sort of parole hearing as an adversary proceeding would contradict both empirical evidence and judicial characterizations of the parole process.

The third safeguard — the ability to correct error on appeal — is, if not entirely absent from the parole process,¹¹¹ largely meaningless once the constitutional injury has been inflicted. The courts of appeals have almost invariably disposed of the second prong of the *Butz* test by extolling the virtues of the writ of habeas corpus as such a safeguard.¹¹² But such analysis is deficient for two reasons. First, a writ of habeas corpus is meaningless as a safeguard to third parties. The Court of Appeals for the Eighth Circuit missed this point in *Nelson v. Balazic*,¹¹³ where the court supported its ruling of absolute immunity for the parole board defendants in a third-party damages suit merely by citing two *parole denial* decisions within that circuit.¹¹⁴ These decisions awarded absolute immunity to parole officials in carrying out their official duties. Purporting to apply the *Butz* standard, the *Balazic* court stated: “the extent of immunity accorded an official depends solely on the official’s function. Whether claimant is an inmate appealing denial of parole or a victim of a parolee’s criminal actions is *irrelevant*.”¹¹⁵ It is difficult to understand how the court could have reached this anomalous conclusion. The fact that habeas corpus actions provide no safeguard or remedy to third parties injured by a parolee is *extremely relevant* to the functional comparability test articulated in *Butz*. Indeed, *Butz*’s second prong reflects the desire to ensure that citizens are protected from constitutional injury. The *Balazic* court skirted the issue of institutional safeguards protecting members of the public for an obvious reason: none exist.¹¹⁶ Thus, in connection with third-party actions, the second prong of the functional comparability test is left unsatisfied.

whether a prisoner is a good parole risk represents an aspect of state prison discipline, not an adjudication of rights in an adversary proceeding.”).

110. *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 9-10 (1978).

111. See notes 65-67 *supra* and accompanying text.

112. See *United States ex rel. Powell v. Irving*, 684 F.2d 494, 497 (7th Cir. 1982) (writ of habeas corpus “adequately guard[s] prisoners’ parole rights without impairing the performance of Board members”); cases at note 28 *supra*.

113. 802 F.2d 1077 (8th Cir. 1986). *Balazic* involved a third-party victim suit brought by three women kidnapped and sodomized by a recent parolee.

114. 802 F.2d at 1078 (citing *Evans v. Dillahunt*, 711 F.2d 828 (8th Cir. 1983); and *Gale v. Moore*, 763 F.2d 341 (8th Cir. 1985)).

115. 802 F.2d at 1078 (emphasis added).

116. The absence of any such safeguard may also explain the hedging of the Ninth Circuit in *Sellers v. Proconier*, 641 F.2d 1295, 1297 n.3 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981): “We leave to another day the question whether parole board officials enjoy any immunity from civil rights suits brought by persons injured by a dangerous parolee.”

The courts' reliance upon the writ of habeas corpus as an important safeguard is deficient for a second reason — a reason relating to parolees rather than victims. While a writ of habeas corpus may be useful as a safeguard against wrongful parole *denials*, it fails to prevent wrongful parole *revocations*. For example, a writ of habeas corpus cannot prevent the practice of "Jail Therapy," an apparently common, albeit Kafkaesque, practice in which persons on probation or parole are arrested, imprisoned, and then released without a hearing.¹¹⁷ A writ of habeas corpus, if necessary, only secures release; it cannot guard against compensable harm a parolee may incur before release.¹¹⁸

Safeguards like those found in the judicial system are conspicuously absent from the parole system. Thus, the need for the section 1983 safeguard is clear. But would fulfilling this need bring an end to vigorous decisionmaking by competent public officials? It would not. In fact, there is good reason to believe that exposure to civil liability will greatly improve the parole process.

II. THE IMPACT OF QUALIFIED IMMUNITY ON PAROLE BOARD ACTIVITY

A second assumption behind the majority and minority approaches to parole board immunity is that, for at least some officials, absolute immunity is necessary to ensure sound decisionmaking. In particular, three concerns about the impact of civil exposure on public officials have surfaced: (1) that limited immunity would dampen vigorous decisionmaking,¹¹⁹ (2) that public officials' valuable time would be consumed litigating meritless claims,¹²⁰ and (3) that the prospect of

117. See, e.g., National Advisory Commission on Criminal Justice Standards and Goals, *The Parole Grant Hearing*, (1973), reprinted in W. AMOS & C. NEWMAN, PAROLE 5, 21 (1975) (parole practice); *Anderson v. Boyd*, 714 F.2d 906 (9th Cir. 1983) (parolee repeatedly arrested on unsubstantiated charges of parole violation); PROBATION AND PAROLE, *supra* note 66, at 137 (probation practice).

118. See, e.g., *Harper v. Jeffries*, 808 F.2d 281 (3d Cir. 1986) (wrongful revocation resulting in parolee's business losses, nonpayment of debts, divorce, and loss of child custody).

119. See *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950) (liability would "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties"). Several commentators have rigidly adhered to this view. See, e.g., Schuck, *supra* note 104, at 282 ("[A] decision maker with a heightened consciousness of the risk of liability for error may respond in ways that elevate personal interest above official duty, supplanting one type of error with another . . ."); Cass, *supra* note 97, at 1155-56 (As individuals particularly prone to "spite suits," public officials must be protected from influences on decisionmaking.). But see Note, *Liability of Judicial Officers Under Section 1983*, 79 YALE L.J. 322, 331 (1969) (arguing that belief that the risk of liability would intimidate judicial officers presumes a weakness in their character).

120. See *Sellars v. Proconier*, 641 F.2d at 1303 ("[T]ime spent in depositions and on the witness stand defending their actions would leave these overburdened [parole board officials] with even less time to perform their crucial tasks."). Recently, the Supreme Court expressed its dissatisfaction with the lack of evidentiary support for this sort of argument. The Court cautioned: "Absolute immunity . . . is 'strong medicine, justified only when the danger of [officials']

civil liability will scare competent persons away from those positions.¹²¹ In theory at least, these concerns appear to be compelling.¹²² However, an examination of the facts demonstrates that these concerns are hardly overwhelming.

An examination of the reality of section 1983 litigation, particularly prisoner petitions, reveals that the assumptions underlying each concern about qualified immunity lack an empirical basis. Rather than hampering sound decisionmaking, qualified immunity should promote more conscientious board action.

A. *The Reality of Section 1983 Litigation*

At first glance, the large number of section 1983 filings, particularly those by prisoners, seems reason enough to cloak every official connected with the penal system with absolute immunity. In this decade alone, the number of state prisoner civil rights petitions has risen from about 17,000 to over 20,000 per year.¹²³ Commentators are fond of citing such large numbers as a preamble to a critique of damages actions for constitutional injuries.¹²⁴

However relevant those figures are to concerns about the strain

being] deflect[ed from the effective performance of their duties] is very great.'” Forrester v. White, 108 S. Ct. 538, 545 (1988) (quoting Forrester v. White, 792 F.2d 647, 660 (7th Cir. 1986) (Posner, J., dissenting)).

121. See Freed, *Executive Official Immunity for Constitutional Violations: An Analysis and a Critique*, 72 NW. U. L. REV. 526, 529 n. 19 (1977); Comment, *Entity and Official Immunities Under 42 U.S.C. Section 1983: The Supreme Court Adopts a Solely Objective Test*, 28 S.D.L. REV. 336, 339 (1983). Professor Freed argues that the threat of civil liability is bound to scare away those with the broadest career choices, whom he considers to be the most able candidates for the positions. The result of such a threat, Freed contends, will be the occupation of public offices by residual applicants, leaving governance in the hands of those most likely to do damage.

There can be little doubt that persons currently enjoying qualified immunity — such as governors, policemen, and public university presidents — would take issue with the implications of Freed's hypothesis. Moreover, recent commentary indicates that Freed's theoretical outcome has failed to materialize. See R. SPURRIER, *RIGHTS, WRONGS AND REMEDIES: SECTION 1983 AND CONSTITUTIONAL RIGHTS VINDICATION*, 141 (1986) (“[T]here is no evidence that the potential Section 1983 liability of [public] officials has caused a less qualified group of applicants to seek the positions.”).

122. However, the Supreme Court has refused to recognize the tendency of prisoners to file numerous and often frivolous lawsuits as sufficient reason to grant absolute immunity. See *Cleavinger v. Saxner*, 474 U.S. 193, 207-08 (1985).

123. 1986 ADMIN. OFF. U. S. CTS. ANN. REP. 179 (1986) [hereinafter 1986 REPORT]. It is important to note that these are aggregate figures. For example, they do not disclose what fraction of the total filings were directed at parole board members, or what proportion of the petitions sought damages, as opposed to injunctive relief. Nonetheless, there is mounting evidence that the proportion of suits brought against parole officials is relatively small. See Bailey, *The Realities of Prisoners' Cases Under 42 U.S.C. § 1983: A Statistical Survey in the Northern District of Illinois*, 6 LOY. U. CHI. L.J. 527, 544 (1975); Eisenberg, *Section 1983: Doctrinal Foundations and an Empirical Study*, 67 CORNELL L. REV. 482, 538 (1982); Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 HARV. L. REV. 610, 623 (1979).

124. See, e.g., Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5, 6 (1980). Although Professor Whitman generally does not favor damages actions under § 1983, she concedes that they may be useful in cases of egregious constitutional violations. See *id.* at 65-67.

section 1983 actions exert upon judicial resources,¹²⁵ it would be seriously misleading to rely upon them to draw conclusions about the effect of qualified immunity upon parole board members. In the first place, filings against board members are a fraction of the annual total, with prisoners filing suits against other officials with whom they more frequently come into contact. More significantly, of that fraction, we can expect only three of ten filings ever to come to board members' attention. Most prisoner petitions are short-lived; in fact, about seventy percent of prisoner petitions are dismissed before service is ever delivered upon the defendant.¹²⁶ A federal pauper's suit statute allows judges (or judicial clerks) to prescreen and dismiss a petition "if the allegation of poverty is untrue, or if [the court is] satisfied that the action is *frivolous or malicious*."¹²⁷ Because most prisoner suits are brought in forma pauperis,¹²⁸ this screening device significantly reduces the likelihood that a parole board member will be the subject of a mere "spite" suit filed by a prisoner.

Significantly, studies tracing prisoner suits from the time of filing to final disposition also show that prisoner suits would not actually entangle parole board members in extensive discovery. For example, one national study of prisoner suits conducted over a five-year period revealed that only three pro se litigants received answers to interrogatories, and none received documents or deposition testimony from defendants.¹²⁹ Clearly, the notion that parole board members protected only by qualified immunity would waste time and money preparing for frivolous litigation seems wildly exaggerated.

Moreover, the myth that parole board officials would waste precious days in trial is unfounded for two reasons. First, *Harlow v. Fitzgerald* enables defendants to dispose of frivolous claims by summary judgment.¹³⁰ If a plaintiff fails to show that the parole board member's actions violated a "clearly established" constitutional right, the parole board member is entitled to claim immunity from damages liability.¹³¹ At that point, involvement in litigation would cease. Sec-

125. This is, of course, the subject of another Note altogether. Professor Turner offers us a window on the issue, revealing that the strain is not so much on judges as it is on law clerks. See Turner, *supra* note 123, at 611-12, 617-21. Furthermore, the question of whether the large number of filings, particularly prisoner filings, indicates an *unjustified* strain on resources is at least as empirical as it is normative. For an indication that it is not, see notes 155-56 *infra* and accompanying text.

126. See Turner, *supra* note 123, at 617-18.

127. 28 U.S.C. § 1915(d) (1982) (emphasis added).

128. See Bailey, *supra* note 123, at 530; Turner, *supra* note 123 at 617.

129. See Turner, *supra* note 123, at 624.

130. 457 U.S. 800, 819 n.35 (1982); see also text at note 24 *supra*.

131. 457 U.S. at 818. For some, the phrase, "clearly established constitutional right" is almost a contradiction in terms. See generally *The Supreme Court, 1981 Term*, 96 HARV. L. REV. 62, 226-36 (1982) (contending that *Harlow* will leave numerous plaintiffs without a remedy in ambiguous or unexplored areas of the law); Comment, *Harlow v. Fitzgerald, The Lower Courts Implement the New Standard for Qualified Immunity Under Section 1983*, 132 U. PA. L. REV.

ond, even if the suit survives summary judgment, extensive involvement by the parole board member herself is unlikely, given the past record of prisoner actions. In 1986 for example, of the relatively small number of prisoner suits that went to trial, nearly ninety percent consumed three days or less.¹³² Furthermore, few cases have arisen in which the defendant was required to make *any* appearance in court.¹³³ Thus, the ugly threat of parole board members being dragged into the quagmire of meritless litigation appears to be chimerical.

Finally, the danger that qualified immunity would expose parole board members to financial devastation is similarly illusory. Damage awards in prisoner litigation have tended to be infrequent and small. The same five-year study of prisoner suits revealed that out of the thousands of prisoner filings made within that period, only *two* resulted in monetary liability: awards for *six dollars* and *two hundred dollars*.¹³⁴ An earlier study of one federal district yielded similarly meager results. Of 218 suits filed in one year, only *one* resulted in monetary liability: *five hundred dollars* for injuries sustained from beatings by prison guards.¹³⁵ In any event, it is difficult to understand why a board member, having been found to violate a clearly established constitutional right causing cognizable injury, *should* escape financial liability. The damages provision in section 1983 reflects that very value judgment. Thus this concern too, is born more of conjecture than of reality.¹³⁶

The view that qualified immunity, exposing parole board officials to a flood of meritless "spite" suits, would result in poor decisionmaking by underqualified officials seems to have support in theory alone. Indeed it is disturbing that this view has enjoyed so much support in light of the easily accessible evidence to the contrary. Of course, this sort of error is neither unique nor new. Bertrand Russell warned:

If the matter is one that can be settled by observation, make the observation yourself. Aristotle could have avoided the mistake of thinking that women have fewer teeth than men, by the simple device of asking Mrs. Aristotle to keep her mouth open while he counted. He did not do

901, 922-32 (1984) (discussing relevant factors in determining whether controlling law was clearly established at time of injury). However, this problem is unlikely to arise in connection with parole board actions because the parameters of prisoners' rights have been clearly established in *Morrissey* and *Greenholtz*. See text at notes 4-8 *supra*.

132. 1986 REPORT, *supra* note 123, at 223 (Table C-8) (of 445 prisoner civil-rights trials in 1986, 396 were resolved in three days or less).

133. See Turner, *supra* note 123, at 624.

134. See *id.*, at 624-25.

135. Bailey, *supra* note 123, at 531 & n.21.

136. It may be contended that the factor most relevant to parole board actions is the *perceived*, rather than the real, threat of monetary liability. If this contention has any weight at all, it is for arguing that parole board members should be better informed as to the real risks to which they are exposed. Risk management programs may be able to provide such information. See text following note 146 *infra*.

so because *he thought he knew*.¹³⁷

Like Aristotle, the courts have relied too heavily on intuition. Had they bothered to examine the hard data, they would have quickly concluded that the prospect of prisoner litigation over parole board actions is not threatening enough to induce decisional paralysis. This is not to say, of course, that a section 1983 damages action is a toothless mechanism. In fact, allowing actions under section 1983 will improve the parole process by creating incentives for more balanced and constitutionally respectful decisionmaking.

B. *Qualified Immunity and Enhanced Parole Board Decisionmaking.*

There are two reasons to believe that exposure to civil liability — limited as it is to violations of clearly established constitutional rights¹³⁸ — will produce more conscientious decisionmaking by parole board officials. First, the threat of suit by either a prisoner or an injured third party for malicious or reckless conduct should inspire a balanced approach to parole decisionmaking. Second, the risk of civil liability may spur efforts to train parole board officials to better respect and preserve individual rights.

1. *Balanced Decisionmaking*

Qualified immunity creates a Scylla-Charybdis system of incentives. By placing parole board officials between section 1983 suits by prisoners on the one side, and third-party victims on the other, qualified immunity motivates parole board members to steer a middle course and not engage in unconstitutional conduct. Specifically, exposing parole board members to twin liability sends two clear messages to parole board members: If members act maliciously in connection with decisions to grant, deny, or revoke parole, they may have to make monetary reparation to the injured prisoner or parolee. Likewise, if they recklessly parole a highly dangerous prisoner, they run the risk of liability to a third-party victim. In such a position, parole board members are unlikely to drift toward draconian or cavalier attitudes toward prisoners and parolees.

A comparison of the expected values of each type of suit demonstrates that neither prospect is so menacing as to paralyze parole boards with indecision. On the one hand, prisoners filing section 1983 petitions in forma pauperis face several obstacles to success, including prescreening of the complaint for frivolity or malice,¹³⁹ limited legal

137. B. RUSSELL, *An Outline of Intellectual Rubbish*, in UNPOPULAR ESSAYS 71, 103 (1950) (emphasis added).

138. See text at note 22 *supra*.

139. See text at notes 127-28 *supra*.

expertise, and apathy or hostility from the bench.¹⁴⁰ Although these hurdles may be lowered somewhat once courts accept qualified immunity and if (a large "if" indeed) courts overcome hostility toward prisoner suits, the expected value of such suits is unlikely to be exorbitant. In the first place, prisoners tend to receive extremely modest damages awards. Because courts are aware of the inverse relationship between large damages awards and the robustness of a public official's decision-making, this trend is likely to continue. Second, there is little reason to believe that many prisoner suits would proceed past the receipt of a settlement offer. Prisoners are well aware of their limited legal resources and are unlikely to turn down a settlement in order to gamble at trial.

Different legal obstacles should give victim's suits a similarly low value. Although a number of courts and analysts have placed a high monetary value on human life,¹⁴¹ two barriers to success should discount that value. First, it is unclear whether a section 1983 action may be barred by a state survivability statute if the plaintiff has died. While the Supreme Court has held that state survival action statutes may terminate section 1983 claims when a plaintiff dies,¹⁴² the Court has reserved judgment on whether the same applies when the plaintiff/decedent's death results from the defendant's alleged unconstitutional conduct.¹⁴³

The causation obstacle should serve as the second discounting factor. In particular, the Supreme Court has been reluctant to characterize acts performed by a wrongfully released parolee as "state action." The Court declined to find the necessary causal connection in *Martinez v. California*.¹⁴⁴ In *Martinez*, a fifteen-year old girl was tortured and murdered by a parolee five months after his release from prison. The parolee, a convicted rapist, had been committed to a state mental

140. See text at notes 152-54 *infra*.

141. See, e.g., *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) (upholding \$100,000 award for decedent's loss of life and enjoyment of living as well as \$25,000 in punitive damages); *Roman v. City of Richmond*, 570 F. Supp. 1544 (N.D. Cal. 1983) (upholding \$1.5 million general damage award for unconstitutional deprivation of life); Earley, *What's a Life Worth?*, Wash. Post, June 9, 1985 (Magazine) at 11 (OSHA establishing \$3.5 million as value of "statistical life").

142. See *Robertson v. Wegmann*, 436 U.S. 584, 590-93 (1978); see also *Carey v. Piphus*, 435 U.S. 247, 258 n.13 (1978) (noting that 42 U.S.C. § 1988 authorizes federal courts to adopt state common law for § 1983 remedies).

143. See *Jones v. Hildebrandt*, 432 U.S. 183, 184-89 (1977). Several federal courts have said that it does not. See *Rosa v. Cantrell*, 705 F.2d 1208, 1220-24 (10th Cir. 1982), *cert. denied*, 464 U.S. 821 (1983) (state law cannot terminate § 1983 actions arising from the decedent's death); *Larson v. Wind*, 542 F. Supp. 25, 26-27 (N.D. Ill. 1982) (state law may not interfere with § 1983 remedies where constitutional tort causes death); *O'Connor v. Several Unknown Correctional Officers*, 523 F. Supp. 1345, 1347-49 (E.D. Va. 1981) (state law may not deny § 1983 recovery for injuries caused by deprivation of decedent's life); cf. *Sager v. City of Woodland Park*, 543 F. Supp. 282, 292-97 (D. Colo. 1982) (state law may only expand, not contract, § 1983 remedies). Still, the question is open in many circuits.

144. 444 U.S. 277 (1980).

hospital and thereafter sentenced for a term of one to twenty years with a recommendation that he not be paroled. Despite this warning, the parole board later released the inmate. The Supreme Court affirmed dismissal of the action for three reasons. First, the killer was not an "agent" of the parole board. Second, there was a five-month time lapse between parole and the murder (which the Court deemed "too remote a consequence" of the defendant's actions). Finally, the defendant was not aware the decedent faced any "special danger" not shared by the public at large.¹⁴⁵

Thus, although third-party victim suits against parole board members create the potential for large damages awards, their expected value is discounted by difficulties in successful prosecution. Put differently, the number of successful third-party victim suits meeting the duty and causation requirements of *Martinez* and its progeny is unlikely to be large enough to overthrow the parole system. The parity of the threats posed by prisoner suits and third-party victim suits allows them to serve as an important moderating influence on parole boards. But while such liability will force parole board members to be more aware of the rights of prisoners and the public, the prospect of liability will not be so menacing as to induce decisional paralysis.

2. Incentives To Enhance Parole Board Quality

Because states may ultimately foot the bill for parole board members' liability, they may wish to reduce that risk by taking steps to

145. 444 U.S. at 285. A number of courts have used *Martinez* to dismiss § 1983 claims against state officials for injuries or deaths caused by parolees. For example, *Fox v. Custis*, 712 F.2d 84 (4th Cir. 1983), involved a § 1983 suit by three women who were variously raped, beaten, shot, stabbed, and set on fire by a parolee. The complaint alleged that the parole board refused to revoke parole despite knowledge that the parolee had violated his parole terms and was already suspected of an act of arson resulting in a woman's death. The court affirmed dismissal of the action on the ground that "the state agent defendants here were 'unaware that the [claimants] as distinguished from the public at large faced any special danger.'" 712 F.2d at 88 (quoting *Martinez*, 444 U.S. at 285). See also *Janan v. Trammell*, 785 F.2d 557, 560 (6th Cir. 1986) (no § 1983 cause of action stated where parolee, having made threats to a police officer's wife and violated parole, murdered someone who was "simply a member of the public at large"); *Humann v. Wilson*, 696 F.2d 783 (10th Cir. 1983) (per curiam).

In fact, some courts have read *Martinez* so restrictively as to deny victims a cause of action under § 1983 even where the defendant was aware of the risk of harm to them. See, e.g., *Estate of Gilmore v. Buckley*, 787 F.2d 714, 721 (1st Cir.), cert. denied, 107 S. Ct. 270 (1986) (plaintiff's decedent murdered by man who had previously threatened her life and who had been hospitalized for mental evaluation as a result of her complaints); *Jones v. Phyfer*, 761 F.2d 642 (11th Cir. 1985) (no special relationship existed where furloughed prisoner raped plaintiff instrumental in his initial conviction for burglarizing her home); cf. *Davidson v. Cannon*, 474 U.S. 344 (1986) (public official's mere negligence in failing to protect one prisoner from another not actionable under § 1983).

However, other courts have been more willing to find sufficient causation. See, e.g., *Dudosh v. City of Allentown*, 629 F. Supp. 849, 853-55 (E.D. Pa. 1985); *Hardmon v. County of Lehigh*, 613 F. Supp. 649, 652-53 (E.D. Pa. 1985) (cause of action stated where prisoner attacked plaintiff's child after officials had been informed prisoner had threatened plaintiff and broken window of her home two days earlier); *P.L.C. v. Housing Auth.*, 588 F. Supp. 961, 965-66 (W.D. Pa. 1984).

prevent unconstitutional parole decisions from being made. Thus, the second positive result of exposure to liability via qualified immunity may be an effort to develop a better-trained body of parole board officials.

One such effort may be the introduction of public risk-management programs into parole agencies. These programs seek to identify practices vulnerable to civil exposure and to remedy them through training and supervision.¹⁴⁶ A number of local governments have implemented risk management programs in response to a Supreme Court decision holding that a municipality may be sued as a "person" under section 1983.¹⁴⁷ Features of such programs may include: (1) instruction/training of officials as to constitutional requirements; (2) establishment of an internal department for the investigation and documentation of high-risk practices; and (3) periodic review of official actions by a designated compliance officer or legal counsel.¹⁴⁸ In addition to increasing awareness about the constitutional implications of parole board actions, risk management programs could allay any fears that tenure on a state parole board is a ticket to financial and professional ruin.

From this analysis it becomes clear that qualified immunity for parole board members could provide the right incentives. The members themselves would have incentive to pay attention to the rights of prisoners and potential victims — the public. This dual exposure to liability would not, however, paralyze the boards, because the onus of successful prosecution would be heavy. Successful claimants would probably be rare, but their existence alone would be a positive step in curbing parole board constitutional violations. A second incentive provided by the imposition of qualified immunity would be the implementation of better risk-management techniques on the state level. Parole board members can be taught how to perform their duties within constitutional bounds. Both of these important incentives would improve the current parole board decisionmaking process immensely. But the benefits of section 1983 are not only found at the level of parole board decisionmaking. These benefits would also be apparent in the realm of simple justice — compensating those suffering the violation of their constitutional rights by parole board members.

146. See INTERNATIONAL CITY MANAGEMENT ASSOCIATION, *PUBLIC OFFICIALS' LIABILITY* (1979).

147. For an example of one county's response to the Supreme Court's decision in *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978), see *id.*, at 26-28.

148. See *id.*, at 21-24; Peters, *Municipal Liability After Owen v. City of Independence and Maine v. Thiboutot*, 13 URB. LAW. 407, 446-47 & n.190 (1981).

III. OVERCOMING INDIFFERENCE TO COMPENSATION UNDER SECTION 1983

The debate over whether section 1983 damages actions are an effective deterrent or an unnecessary hindrance to state officials has been so heated that the other purpose of section 1983 — to compensate the victims of constitutional deprivations — has been ignored. However, an examination of this important aim reveals a pressing need to deny parole board members absolute, quasi-judicial immunity from civil suits.

Courts and commentators have been guilty of slighting this issue for two reasons. First, they have mistakenly assumed that a habeas corpus action provides a sufficient remedy to prisoners. Second, they have largely ignored the possibility that members of the public may suffer constitutional deprivations as a result of a parole board member's actions. This section will address these two misconceptions and direct attention to the needs — for both financial and symbolic relief — that awarding qualified immunity to parole board members can satisfy.

A. *The Inadequacy of Habeas Corpus Relief*

Virtually every court awarding absolute immunity to parole board members has found the existence of a habeas corpus remedy to be a decisive factor.¹⁴⁹ Yet careful analysis shows that this civil remedy is woefully inadequate for both prisoners and third-party victims because it is not appropriate relief for a damages claim, and cannot be used at all by third-party victims.

1. *Prisoner Relief: Suffering from the Sins of Excess*

An attempt to account for judges' reluctance to award damages to prisoners who have suffered constitutional deprivations yields no easy answer. One seemingly obvious explanation is that the courts have mistaken the safeguard value of a habeas corpus remedy, limited as it is,¹⁵⁰ for compensation. However, in light of the Supreme Court's pronouncement in *Preiser v. Rodriguez*, that mistake is not easy to make:

If a state prisoner is seeking damages, he is attacking something other than the fact or length of his confinement, and he is seeking something other than immediate or more speedy release — the traditional purpose of habeas corpus. *In the case of a damages claim, habeas corpus is not an appropriate or available federal remedy.*¹⁵¹

Because the distinction has been clearly made, it is hard to imagine

149. See note 112 *supra* and accompanying text.

150. See text at notes 112-13 *supra*.

151. 411 U.S. 475, 494 (1973) (emphasis added).

that the reasoning of the courts of appeals is merely the product of judicial oversight.

A more plausible explanation for the denial of damages awards to prisoners is the well-documented apathy and even antipathy many federal judges hold toward prisoner litigants. Judges not only frequently complain about the growing number of section 1983 prisoner suits,¹⁵² but they express outright hostility toward petitioners who bring them as well.¹⁵³ This hostility begins with the inference that the large number of prisoner civil rights petitions, about 20,000 in 1986,¹⁵⁴ means that section 1983 is being used to bring the "wrong" kind of suit. The falsity of this inference has not escaped criticism from commentators and at least one Supreme Court Justice.¹⁵⁵ Nevertheless, this fallacy remains because judges are prone to reinforce it with a few anecdotal examples of abuse they have heard of or witnessed.¹⁵⁶

Given the not-so-subtle predisposition against prisoner section 1983 suits, it is not altogether surprising to find courts slighting the issue of prisoner compensation. In parole denial cases, the court may view the monetary loss due to prolonged imprisonment as fairly negligible.¹⁵⁷ This generalization, dubious in connection with parole *release* decisions,¹⁵⁸ is clearly inaccurate in connection with parole *revocations*. Wrongfully imprisoning a parolee can result in very real monetary damages such as loss of employment or business opportunities.¹⁵⁹ In sum, the general statement that habeas corpus suits provide adequate compensation for prisoners smacks of judicial impatience

152. See, e.g., *Pulliam v. Allen*, 466 U.S. 522, 556 n.16 (1984) (Powell, J., dissenting); *Maine v. Thiboutot*, 448 U.S. 1, 27 & n.16 (1980) (Powell J., dissenting); *Gittlemakker v. Prasse*, 428 F.2d 1, 2 & n.1 (3rd Cir. 1970).

153. See, e.g., *United States ex rel. Pope v. Williams*, 326 F. Supp 279 (E.D. Pa. 1971); *Bailey*, *supra* note 123, at 547-49; *Turner*, *supra* note 123, at 638 n.144.

154. See 1986 REPORT, *supra* note 123, at 179 (Table C-2A).

155. See Eisenberg, *supra* note 123, at 538 ("[M]ost prisoner section 1983 complaints [studied] were not plainly trivial assertions implicating little or no federal interest."); Blackmun, *Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 21 (1985) ("I suspect that improvements in prison conditions of recent years are traceable in large part, and perhaps primarily, to actions under § 1983 . . .").

156. See Eisenberg, *supra* note 123, at 536. ("[T]he judge needs only slight anecdotal evidence to conclude that section 1983 is a source of abuse. The evidence may consist of a case or two of his own . . . or courthouse scuttlebutt may suffice.")

157. Determining what amount would be proper for wrongful incarceration is beyond the scope of this discussion. For a fairly broad treatment of this issue see Newman, *Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damage Remedy for Law Enforcers' Misconduct*, 87 YALE L.J. 447 (1978).

158. Actions of parole board members can be financially devastating to parolees. For example, in *Anderson v. Boyd*, 714 F.2d 906 (9th Cir. 1983), it was alleged that a parolee lost his livelihood as a racehorse trainer after parole board members disseminated false information to the State Racing Commission. Specifically, the officials distorted the parolee's criminal record and spread false rumors that the parolee was connected with several unsolved murders. Upon hearing this information, the Racing Commission revoked the parolee's racing license. 714 F.2d at 910.

159. See note 118 *supra*.

with prisoner suits.¹⁶⁰ Habeas corpus actions seek a different remedy.

2. *Victim Suits: Guilt by Association?*

The granting of absolute immunity based upon the existence of an alternative habeas corpus remedy is even more bewildering when considering the opposite side of the section 1983 coin: damages suits brought by third-party victims of parolee crimes.

A writ of habeas corpus can provide no compensation (or consolation) to nonprisoners. Yet, in *Nelson v. Balazic*,¹⁶¹ the Eighth Circuit failed to consider this self-evident truth. Instead, the court ignored the victims' plea for relief and woodenly applied precedent from earlier prisoner suits.¹⁶² It appears that by being lumped together with the perennially unpopular prisoner litigants, third-party victims have been met with cool judicial suspicion.

In light of the compensatory purpose of section 1983, the need to permit citizens stating a cause of action to seek money damages should no longer be excluded from the immunity calculus. Compensation for the loss of life or liberty resulting from unconstitutional conduct was one of the driving forces behind the enactment of section 1983 in the first place.¹⁶³ Awarding parole board members absolute immunity can only serve to thwart that central purpose. In the relatively rare case where a third-party victim meets the heavy standard necessary to sustain a section 1983 action,¹⁶⁴ absolute immunity constitutes a complete and unnecessary bar to recovery.

B. *The Symbolic Value of Section 1983 Compensation*

Finally, requiring parole board members to answer for the constitutional injuries they inflict provides symbolic relief by vindicating the rights of civilians and prisoners alike. Section 1983 stands for the principle that state officials are not above the Constitution.¹⁶⁵ Subjecting parole board officials to liability for established constitutional injuries ensures the continued vitality of that principle.

This symbolic value has not gone unnoticed by at least one sitting member of the Supreme Court: "Today, section 1983 properly stands for . . . the commitment of our society to be governed by law and to protect the rights of those without power against oppression at the

160. For one federal judge's plea to his colleagues for increased patience, see generally Doyle, *The Court's Responsibility to the Inmate Litigant*, 56 JUDICATURE 406 (1973).

161. 802 F.2d 1077 (8th Cir. 1986) (§ 1983 damages action by three women kidnapped and sodomized by a recklessly released parolee).

162. 802 F.2d at 1078.

163. See generally Kinoy, *supra* note 12.

164. See notes 142-45 *supra* and accompanying text.

165. See notes 12-13 *supra*.

hands of the powerful.”¹⁶⁶ Thus, Justice Blackmun concludes, our political system can ill afford to allow section 1983 to fade away. One commentator has gone so far as to assert that “[s]ociety . . . has a *right* to insist that when public officials conduct themselves egregiously, they do so at their own risk.”¹⁶⁷

The need to call officials to account by imposing the threat of civil liability for their actions appears even stronger in consideration of the increased power of unelected members of state government. As increasing numbers of nonelected, nonjudicial officials acquire the ability to violate individuals’ constitutional rights, there is a pressing need for society to exert at least some form of control.¹⁶⁸ Qualified immunity serves this need without unduly interfering with the day-to-day conduct of the officials.

However, it has been suggested that damages relief is an unnecessary method of serving that need.¹⁶⁹ Equitable or declaratory relief is better suited to the task, it is argued, because in cases where the affirmation of rights is most important, courts are least likely to award damages.¹⁷⁰

When applied to parole board actions, this argument is unpersuasive for two reasons. First, its premise — that “[a] litigant *cares most* about getting a declaration of constitutional protection when the right that he is asserting has not yet been generally acknowledged by the courts, or . . . extended to the facts of his case”¹⁷¹ — does not readily apply to suits against parole board members. In those cases, the opposite may be true: a person may care most about constitutional protection of *well-established* rights. An egregious violation of her constitutional rights seems more likely to produce more outrage, and thus a greater need for affirmation of those rights, than a “borderline” violation. Indeed, in the case of the latter, the average person may be wholly unaware that a constitutional right is implicated.¹⁷²

The second reason this argument is unpersuasive in the parole con-

166. Blackmun, *supra* note 155, at 28. Although Justice Blackmun speaks in contemporaneous terms, it should be noted that this idea is not new. Indeed, Chief Justice Marshall long ago emphasized that “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

167. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1199 (1977) (emphasis added).

168. *Cf. Grimm v. Arizona Bd. of Pardons and Paroles*, 115 Ariz. 260, 266, 564 P.2d 1227, 1233 (1977) (en banc) (“In this day of increasing power wielded by governmental officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even *dangerous*.”) (emphasis added).

169. *See Whitman, supra* note 124, at 52-53.

170. *Id.*

171. *Id.* at 52 (emphasis added).

172. Again, this is not to say that litigants advancing test cases in constitutional law do not have an important interest. The point here is that citizens who have undeniably been deprived of a constitutional right may have a greater need to see that the guilty state official is made responsi-

text is that it does not take the needs of victims into account. As the *Butz* Court bluntly pointed out, "[i]njunctive or declaratory relief is *useless* to a person who has already been injured."¹⁷³ Worse still, a federal court's award of only nominal relief stands as a symbol of the federal government's indifference toward the needs of victims created by state official misconduct.¹⁷⁴ Thus, for citizens whose clearly established constitutional rights have been violated, "[a] damage award under section 1983 can serve as an assertion with bite that the federal government regards the right as important enough to merit federal protection."¹⁷⁵

Given the symbolic value of allowing section 1983 suits against parole board members, and the inadequacy of habeas corpus relief for prisoners and victims alike, it is clear that qualified, not absolute, immunity should be given to parole board members. Courts have rarely reached this conclusion, yet an examination of the facts allows no other.

CONCLUSION

A majority of the courts considering the appropriate level of parole board member immunity have opted for absolute, quasi-judicial immunity for some, if not all, parole board actions. Although these decisions cannot be said to have been the product of careful application of the *Butz* test, the policy reasons behind them have an intuitive appeal: parole board officials face the unenviable task of attempting to predict the future behavior of persons hitherto deemed unfit to circulate in society. The workload is high, the plaudits few. Thus, it *seems* unfair to expose these officials to money damages for decisions they are required to make. It also *seems* inevitable that any level of civil exposure would become so burdensome that all decisionmaking would suffer.

But intuition is an unreliable method of analysis. Seemingly obvious preconceptions have the habit of withering in the stark light of reality. Qualified immunity would not expose parole board officials to liability for reasonable errors in judgment. Such judicial second-guessing would not only be burdensome, but would constitute an intrusion upon executive power. Instead, qualified immunity would only come into play in extreme cases, where the injury is the violation of a clearly established constitutional right.

Practical realities about the results of prisoner litigation also have

ble for her misdeeds. The prospective nature of equitable relief makes it less likely to satisfy an injured party's concerns than monetary relief.

173. *Butz v. Economou*, 438 U.S. 478, 504 (1978) (emphasis added).

174. See Love, *Damages: A Remedy for the Violation of Constitutional Rights*, 67 CALIF. L. REV. 1242, 1281 (1979) ("[N]ominal damages will more often have the symbolic effect of diminishing the legitimacy of the plaintiff's complaint.").

175. Whitman, *supra* note 124, at 52.

exposed the unreliability of intuition. The belief that qualified immunity would mire board members in vexatious litigation — the very heart of the absolute immunity argument — is soundly contradicted by the empirical evidence. The available empirical data on prisoner litigation point unwaveringly to one conclusion: the large number of prisoner filings is deceptive because few cases advance as far as discovery. Indeed, the Supreme Court has already said as much. Even in a less hostile judicial atmosphere, relatively few claimants would prevail at trial. But the existence of the possibility of liability would be an important moderating influence on parole boards.

Instead of resting on a quicksand foundation of intuition, anecdotes and stereotypes, the federal courts should build upon two firm realities. First, boards are not benches after all — the gulf between the two in terms of procedure, political accountability, background, and training is almost immeasurable. Second, section 1983 was designed to deter unconstitutional conduct by compelling state wrongdoers to compensate those they injure.¹⁷⁶ By grounding their analyses in reality, the courts must inevitably conclude that denying absolute, quasi-judicial immunity to parole board members is neither unwarranted nor unfair. Qualified immunity will not only help raise the level of parole board conduct, but provide both compensatory and symbolic relief to victims of constitutional deprivations.

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176. See generally Kinoy, *supra* note 12.